IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1510

GOOSE CREEK CONSOLIDATED INDEPENDENT SCHOOL DISTRICT,
*Petitioner*

v.

ROBERT HORTON, as next friend of ROBBY HORTON, HEATHER HORTON and SANDRA SANCHEZ, on their own behalf and on behalf of all others similarly situated,
*Respondents*

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a Petition for a Writ of Certiorari should issue where the judgment of the court of appeals is not final, and important questions constituting a substantial portion of the issues in dispute in the case have been remanded to the district court for a more complete development of the record.

2. Whether the court of appeals' holding that the use by petitioner of "sniff" dogs to smell students attending classes constituted a search within the meaning of the Fourth Amendment—a holding not contrary to the decision of any other federal courts of appeal—merits review.

3. Whether the standard utilized by the court of appeals holding that the searches at issue are unreasonable absent "reasonable suspicion" merits review.

4. Whether the court of appeals correctly reversed the denial of class certification by the district court and ordered such certification, having found an abuse of discretion by the district court in its denial.

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Robert Horton, et al., respondents, hereby file this their Brief in Opposition to petitioner's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit on the merits of the case is reported

at 690 F.2d 470. The opinion of the United States Court of Appeals for the Fifth Circuit denying petitioner's Petition for Panel Re-Hearing and Suggestion for Re-Hearing En Banc is reported at 693 F.2d 524.

## STATEMENT OF THE CASE

### A. Course of Proceedings:

On April 2, 1980, plaintiffs filed a Complaint in this matter alleging violations of their Fourth, Fifth and Fourteenth Amendment rights by defendant's use of "sniff" dogs to search the persons and property of students located within the Goose Creek schools. A class consisting of all students then enrolled in the school district was likewise sought by the Complaint. The District timely answered and filed a Motion to Dismiss and Motion for Summary Judgment. Plaintiffs then filed a Cross Motion for Summary Judgment on June 23, 1980, and a Motion for Class Certification on July 16, 1980. Following a hearing before the court, United States District Judge Robert O'Conner entered final judgment on May 1, 1981, denying plaintiff's Motion for Class Certification and granting the District's Motion for Summary Judgment.

A timely Notice of Appeal to the United States Court of Appeals for the Fifth Circuit was filed by plaintiffs and following oral argument and the publication and withdrawal of one opinion, that court issued an opinion on November 1, 1982 reversing the district court's denial of class certification and ordering that a class be certified, reversing the district court's findings on certain of the merits of the case and remanding certain other issues to the district court in order that the record might more completely be developed.

**B. Statement of Facts:**

In 1978 the Goose Creek Independent School District, covering a geographical area of approximately 130 square miles in and around Baytown, Texas, approved a "drug prevention program" implemented in the 1978-1979 school year. As part of that program, the district hired Security Associates International, Inc. (SAI) of Houston, Texas, to supply trained "sniff" dogs to search the lockers, automobiles, personal property and persons of the students in the school district. There are approximately 15,400 students located in 11 elementary schools, 4 junior high schools, 2 high schools and 2 special education schools in Goose Creek. (R. 123-124).

The search procedure calls for the dogs to be brought by SAI personnel to the administrative offices of the school district almost every day of the school year where they are then sent to the various schools of the district for their search program based upon a schedule which Mr. Billy Dornburg, as Administrator of the drug prevention program, has arbitrarily prepared. (Dornburg depo. 19-25).

The dogs are brought onto school property and led by a trainer as they sniff through the lockers and automobiles of that school's student body. The dogs are also brought unannounced into individual classrooms while classes are in progress and, while normal teaching methods are stopped, allowed to roam up and down the aisles of the classroom sniffing the desks and smelling and touching the bodies of individual students within the classroom. (R. 124).

When a dog "alerts" on an individual student (a sign which apparently only his trainer is able to detect), the

student is told to report to the school administrator's office where he or she is frisked and where his or her pockets and garments are searched. (R. 44).

Testimony by representatives of SAI indicated that these "sniff" dogs alert not only on marijuana, alcohol and other illicit drugs, but on all other drugs as well, prescription and non-prescription, and also on such innocent items as prefume and shoe polish. (Newman depo. 22-30, 49-50, 66).

In the 1979-1980 school year, the SAI dogs conducted 296 visits to all 19 schools within the Goose Creek Independent School District and amassed some 670 search hours on all but 16 days of the school year. (Exhibit 1 to Dornburg depo.).

Respondent Robby Horton was forced to undergo a frisk and body search after a dog alerted on him in a classroom, but no drugs or other illicit items were found in his possession. Respondent Heather Horton has been in a number of classrooms where searches have been conducted by the dogs, and respondent Sandra Sanchez was physically searched and had her purse snatched away from her and searched without her permission following an "alert" by a "sniff" dog. The only item of a "questionable" nature found on Ms. Sanchez following her search was a bottle of perfume. (R. 124-125).

The Fifth Circuit, drawing upon the number of cases which have examined the use of "sniff" dogs to smell the baggage of suspected drug couriers in airports, distinguished between the sniffing of the persons of students and the sniffing of those students' lockers and automobiles.

The court found that the smelling of lockers and automobiles, involving as it did a lesser degree of intrusiveness than the smelling of persons, was not a search and

thus did not draw into play the full analysis required by the Fourth Amendment. On the other hand, the court found that the sniffing of students resulted in a great degree of personal intrusiveness and clearly offended the reasonable expectations of privacy enjoyed by those students. Noting that the Fourth Amendment applies to students within a public school district and that the distinctive needs of such a school district must be balanced by the Fourth Amendment rights of the students, the court held that the searches involved here were so offensive and intrusive as to violate the Fourth and Fourteenth Amendments to the United States Constitution.

In addition, the court confronted the situation where school authorities had searched students' lockers and automobiles after a dog had "alerted" on such locker or automobile. Since there had been no substantial development of the record regarding the sniffing reliability of the dogs used by petitioner, and since the meager record before it raised substantial question as to that reliability, the court remanded the case to the district court for further development of the issue of the dog's reliability so that the validity of those further searches could be adjudicated.

The court then painstakingly examined the issue of class certification in this case and noted that despite the fact that the district court had offered no explanation for its denial of class certification, such denial could be affirmed if obvious reasons existed in support of it. The court found however, that there was no doubt that plaintiffs had met all the requirements necessary for the certification of a class and that the fears expressed by petitioner as to the possibility of antagonism within the class were not of such weight as to preclude certification.

## REASONS WHY THE COURT SHOULD DENY THE WRIT

Although under 28 U.S.C. § 1254(1) the Court has the power to review a case in this posture, this matter is not ripe for review by the Court. The judgment of the United States Court of Appeals for the Fifth Circuit is not final, the case having been remanded to the district court for further determination of issues which form a substantial portion of the dispute in this matter. Moreover, certiorari should further not be granted because the decision reached by the court of appeals is in harmony with decisions and approaches taken by other courts of appeal which have examined the use of "sniff" dogs to perform searches and seizures as well as decisions reached and approaches taken by other courts of appeal regarding the constitutional rights enjoyed by students attending public schools. Finally, the decision here regarding the certification of a class is in total accord with established judicial doctrines governing class certification.

### I

### THIS CASE IS NOT RIPE FOR SUPREME COURT REVIEW

Plaintiffs have sought throughout the course of this litigation to end practices violative of the Fourth and Fourteenth Amendments to the United States Constitution. One of those alleged practices, the use of "sniff" dogs to smell the persons of students within a school district, has been found by the court of appeals to be an unreasonable search violative of the Constitution. Another of those practices, the use of "sniff" dogs to smell the lockers and automobiles of students in the district, has been held by the court not to rise to the level of a "search"

as defined by the Constitution. A third practice, one intimately connected to the other two, is the search by school administrators of student's lockers and automobiles based upon an "alert" by "sniff" dogs. Plaintiffs have protested throughout that said searches cannot be made because they are not based on even the reasonable likelihood that contraband exists in the locker or automobiles due to the unreliability of the alleged dog "alert." If that reasonable likelihood does not exist, the search cannot be conducted within Fourth Amendment parameters.

The court of appeals found that the development of a record on this point has not yet been made. The matter has thus been remanded to the District Court for a factual determination of the "reasonable reliability" of the dogs involved in order that a legal decision can be made as to the validity of further searches based upon their "alerts". That remand is of course, presently pending.

Thus the judgment of the court of appeals is in no way final, an important claim of respondents still remaining to be adjudicated by the parties. It is clear that among the grounds prompting this Court to deny a petition for writ of certiorari is that the lower court's judgment sought to be reviewed is not final. *State of Maryland v. Baltimore Radio Show, Inc., et al.*, 338 U.S. 912 (1950). Denial of this petition is plainly in accord with the Court's settled policy of avoiding premature or abstract determinations of constitutional rights. *Rescue Army v. Municipal Court of the City of Los Angeles*, 331 U.S. 549 (1947); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J.).

Such a denial is especially important in this matter in order that "piecemeal appellate disposition" will not have

to be made of the important issues in this case. Due to the importance attached to searches of lockers and automobiles by school administrators both by plaintiffs who seek to enjoin unconstitutional activity and by the District which seeks to engage in such activity to stem a perceived problem of drug abuse, it is very likely that whatever disposition the district court makes of the reliability issue, this matter will be appealed once again to the Fifth Circuit. Certainly such a multiplicity of appeals involving the same issues should be avoided if at all possible. Thus, the Court is urged to deny petitioner's Petition for Writ of Certiorari because the issues presented herein are simply not ripe for review at this time.

## II

## THE JUDGMENT OF THE COURT OF APPEALS IS CORRECT AND IS CONSISTENT WITH PREVIOUS DECISIONS AND FOURTH AMENDMENT ANALYSIS OF THE FEDERAL COURTS

### A. The Use of "Sniff" Dogs to Smell the Persons of Individuals is a Search:

Just as did the lower court whose decision it was reviewing, the Fifth Circuit found that the use of dogs to smell the persons of students within the Goose Creek Independent School District constituted a search within the meaning of the Fourth Amendment to the United States Constitution. Said finding was premised upon the high degree of personal intrusiveness of the dog sniff as well as the fact that said intrusiveness offended the reasonable expectation of privacy which every individual enjoys in his person. *Katz v. United States*, 389 U.S. 347 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968).

Far from being inconsistent with the decisions of other federal courts which have examined these matters as is alleged by petitioner, such a finding is wholly in accord with the Fourth Amendment analysis utilized by today's federal courts. The fact is that in all cases cited by petitioner on pages 9 and 10 of its Petition, cases by which the District attempts to demonstrate an inconsistent ruling here, (aside from the *Renfrow* case which will be discussed below), the courts were faced with situations which involved not the sniffing of persons but rather of inanimate objects; i.e., luggage. Those cases are further inapposite to the issues in dispute here for two reasons. First, in each case the canine sniff was conducted only after the police units involved had either been tipped off by informants that the individuals whose property was searched were suspected of transporting narcotics or by other government agents whose surveillance of the individuals prompted a suspicion of narcotics transportation. Second, in each case the canine sniff was conducted only upon the property of the individual involved and only in the air space around his or her luggage rather than actually in the luggage or on the individual's person.

Thus, in each case, the use of canines was not an "indiscriminate, exploratory search" as is the situation here nor did the sniff in any way involve an intrusion upon the actual person of the individual involved. Furthermore, the courts whose decisions have been cited by petitioner realized themselves this important distinction. As the Seventh Circuit noted:

> "This is not a case in which we need confront the thorny problem of an indiscriminate, dragnet-type sniffing expedition. Rather, this is a case in which authorities already had a reasonable suspicion to

> believe that the luggage contained contraband and used a dog as a further investigatory device." *United States v. Klein*, 626 F.2d 22, 27 (7th Cir. 1980).

The Fifth Circuit held in its opinion in this case that the decisions of *United States v. Goldstein*, 635 F.2d 356 (5th Cir. 1981) and *United States v. Viera*, 644 F.2d 509 (5th Cir. 1981) dictated the finding that the sniffing of lockers and automobiles in the Goose Creek district, similar as it was to the sniffing of luggage in those cases, was not a search. All other cases likewise contained the same distinction noted above. See, *United States v. Fulero*, 498 F.2d 748 (D.D.C. 1974); *United States v. Bronstein*, 521 F.2d 459 (2nd Cir. 1975); *United States v. Solis*, 536 F.2d 880 (9th Cir. 1976); *United States v. Venema*, 563 F.2d 1003 (10th Cir. 1977); *United States v. Burns*, 624 F.2d 95 (10th Cir. 1980); *United States v. Klein*, 626 F.2d 22 (7th Cir. 1980); and *United States v. Waltzer*, 682 F.2d 370 (2nd Cir. 1982).

Indeed the Court in *Waltzer* specifically noted:

> "The owner is not subjected to the inconvenience and possible humiliation entailed in other less discriminate and more intrusive methods. Sniffing [of luggage] results in virtually no annoyance and rarely even contact with the owner of the bags, unless the scent is positive, in which case, as we hold, probable cause has been established." *United States v. Waltzer, supra*, at 373.

It is the indiscriminate and personal nature of the sniffing here which gives the use of dogs by Goose Creek the nature of being a search within the parameters of the United States Constitution. Such was not present in any of the above cited cases. For, as the Ninth Circuit has noted:

> "Nothing would invoke the spectre of a totalitarian police state as much as the indiscriminate, blanket use of trained dogs at road blocks, airports, and train stations. (citations omitted). Similarly, the use of dogs to sniff people, rather than objects is highly intrusive and is normally inconsistent with the concepts embodied in our constitution." *United States v. Beale*, 674 F.2d 1327, 1336 n.20 (9th Cir. 1982).

The only case in any way inconsistent with these clearly elucidated points of law is *Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. Ind. 1979) aff'd. in part, rev'd. in part 631 F.2d 91 (7th Cir. 1980), cert. den. 451 U.S. 1022 (1981). In that case, the Seventh Circuit did in fact, endorse the lower court's finding that the use of "sniff" dogs on one campus in the Highland, Indiana School District did not constitute a search.[1] Petitioner is incorrect however, when it alleges that the *Renfrow* case is "identical to the one presented herein" for in that case, as the Fifth Circuit correctly noted, the level of individual intrusiveness was not as great as that confronting students in the Goose Creek School District. Furthermore, the level of intrusiveness did not in any way rise to that at issue here for the use by dogs in Highland was merely for one morning out of the entire school year as opposed to the daily harrassment of students in Goose Creek by canine searches.

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1. The Seventh Circuit Court of Appeals in *Doe v. Renfrow* merely adopted the opinion of the lower court as its own, save for the lower court's holding that a nude search conducted of a female high school student by school administrators did not give rise to any damages as being "reasonable". The court thus failed to conduct any independent analysis of the Fourth Amendment problems presented in the case or in any way closely examine the legal issues involved, a fact decried by the four circuit judges, including Chief Judge Fairchild, who dissented from the court's denial of petition for rehearing. *Doe v. Renfrow, supra*, at 93-95.

Judge O'Conner of the United States District Court for the Southern District of Texas recognized this distinction; the district court in the factually identical case of *Jones v. Latexo Independent School District*, 499 F. Supp. 223 (E.D. Tex. 1980)[2] recognized this distinction; and all other federal courts confronted with this problem have recognized this distinction. The Fifth Circuit's opinion regarding the Fourth Amendment nature of dog sniffing is not only correct and proper but is totally consistent with federal court decisions in this area.

**B. The Standard Used by the Fifth Circuit to Determine the "Reasonableness" of the Dog Searches was Proper and is Consistent with Federal Law:**

Likewise, the Fifth Circuit was entirely correct in its finding that the dog searches here were unreasonable and thus violative of the Fourth Amendment.

The District has attempted to lead the Court to believe that the Fifth Circuit in this case has followed merely the decision of a 1977 New York district court case by rejecting "the *in loco parentis* doctrine and a plethora of decisions recognizing a special situation presented by the public school environment" and demanding a showing of individualized suspicion without which "sniff" searches were held to be constitutionally invalid.

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2. The court in *Jones* was confronted with a situation where the school district, a small district in East Texas, had, like Goose Creek, hired Security Associates International, Inc. (SAI) of Houston, Texas to conduct a large scale program of dog searches in the schools of the district. That program was enjoined by the court as being violative of the Fourth Amendment after a finding that the dog use in Latexo was "sweeping, undifferentiated, and indiscriminate in scope" and lacking in "some articulable facts which focus suspicion on specific students" . . . *Jones v. Latexo Independent School District, supra*, at 223, 236.

On the contrary, the court's decision is in total accord with the law as set down by this Court and in fact quite explicitly recognizes the special situation presented by the conditions of public school education.

As this Court has held, ". . . a search or seizure of a person must be supported by a probable cause particularized with respect to *that* person". *Ybarra v. Illinois,* 444 U.S. 85, 91 (1979) (emphasis supplied). Nothing is more repugnant to that principle than indiscriminate, discretionary dragnet-type searches which by their very nature lack the required effort by governmental agents to determine who the wrongdoers in society are. See *United States v. Beale, supra; Jones v. Latexo Independent School District, supra; Bellnier v. Lund,* 438 F.Supp. 47 (N.D.N.Y. 1977).

This Court has likewise made it clear that this prohibition against an unreasonable search and seizure applies with equal force in the public schools of this nation and protects with equal force students who indeed do not ". . . shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. Des Moines Independent School District,* 393 U.S. 503, 506 (1969). This Court has held on every occasion in which it has faced the issue that all school policies must conform to the basic constitutional principles embodied in the Fourth, Fifth and Fourteenth Amendments. See *Wood v. Strickland,* 420 U.S. 308, (1975); *Goss v. Lopez,* 419 U.S. 565 (1975); *West Virginia State Board of Education v. Barnette,* 319 U.S. 624 (1943).

The Fifth Circuit did realize that public schools are "special" places in society and that greater intrusions into areas governed by privacy expectations must be allowed

in order that school officials might carry out their mandate to protect the health and safety of students being educated by them. But the court likewise recognized, as this Court has demanded in the above cited cases, that the traditional doctrine of *in loco parentis* cannot be used to invalidate constitutional rights. See also *Picha v. Wielgos*, 410 F.Supp. 1214, 1218 (N.D. Ill. 1976); *State v. Mora*, 307 So.2d 317 (La.), vacated 423 U.S. 809, same result reached on reconsideration, 330 So.2d 900 (La. 1975), cert. den. 429 U.S. 1004 (1976).

Thus, the court of appeals' decision was entirely proper and consistent when it demanded that at least reasonable cause exist to authorize canine searches of individual students by the District. Finding that such reasonable cause did not exist because of the indiscriminate nature of searches, it held them to be unconstitutional. In doing so, the court, contrary to petitioner's arguments, did not hold school officials to the same standard as law enforcement officials. To the contrary, it applied a less restrictive constitutional standard to their actions. Petitioner would have the court ignore the Constitution in a case involving a public school, a course which neither this Court nor the Constitution permits.

## III

## THE COURT OF APPEALS CORRECTLY ORDERED THAT THE CLASS OF STUDENTS BE CERTIFIED

Petitioner's final argument that the Fifth Circuit failed to find an abuse of discretion in the lower court's denial of class certification and thus its order requiring class certification was in error indicates a lack of understanding of the Fifth Circuit opinion and of the concept of class

action litigation as embodied in Rule 23 of the Federal Rules of Civil Procedure.

In the first place, it is hard to understand how that ruling, involving as it does only injunctive and declaratory relief, rises to a level of sufficient importance either to defendant or, more importantly, this Court so that it should merit review. Moreover, far from ignoring precedent indicating that a finding of discretionary abuse is vital in an appeals court's decision to overturn a lower court's denial of certification, the Fifth Circuit here specifically cited the cases noted by petitioner mandating such.

Furthermore, unlike the district court which simply dismissed plaintiffs' Motion for Class Certification with no explanation whatsoever, the Fifth Circuit examined the issue closely and in a scholarly manner, most particularly petitioner's claims that the possibility of antagonism exists within the class. Indeed, the court went out of its way to attempt to uncover any reasons justifying the lower court's decision which, as noted above, was made without explanation. The court concluded that there were none.

On the contrary, the court found that plaintiffs had indeed met all requirements necessary for class certification and specifically found, contrary to the District's suggestion, that plaintiffs were "commendable" representatives of the class certified.

As to the question of antagonism, it must again be noted that the district court did not explicitly raise that point in its order and yet the Fifth Circuit still went through a painstaking examination of the issue. The court found in accord with *Hansberry v. Lee,* 311 U.S. 32 (1940) that the mere possibility of ideological class anta-

gonism cannot preclude class certification in every case and that in this matter, where the interests of all absentee class members have been and will be protected throughout the course of litigation, class certification was in fact proper.

Such a finding again is in complete accord with applicable case law. See e.g., *Griffin v. Burns*, 570 F.2d 1065, 1072-74 (1st Cir. 1978).

## CONCLUSION

Far from rejecting substantial case law precedent as is alleged by petitioner, the Fifth Circuit in this case has utilized existing precedent and modes of analysis in a thoughtful and scholarly fashion to arrive at a commendable legal solution to a very complicated question, the use of "sniff" dogs in the public schools. The court has found that the use of those dogs to actually smell the persons of students in the district is of such an intrusive and offensive nature that it rises to the level of a constitutional search and, lacking any reasonable cause or suspicion to justify it, must be held to be violative of the Constitution. Such is in accord with applicable case law. Further, the court, confronted with a class of over 15,000 students, sharing common questions of law and fact, typical of those confronted by the named plaintiffs, who have shown the adequacy of their representation, has ordered the class certified in complete accord with applicable case law.

Finally, petitioner has attempted to file with this Court a Petition for a Writ of Certiorari which requests review of an issue not yet ripe for final adjudication.

The Petition for Writ of Certiorari should thus be denied.

Respectfully submitted,

By: _____

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